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EX PARTE OR LATE FILED

August 16, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room No. TW-B204
Washington, D.C. 20554

RE: **Notice of Ex Parte Presentation**
CC Docket No. 96-98 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996
CC Docket No. 99-68 Inter-Carrier Compensation for ISP-Bound Traffic

Dear Ms. Salas:

On August 15, 2000, Don Cain, Gary Phillips and I met with Tamara Preiss, Rodney McDonald and Adam Candeub of the Common Carrier Bureau. The purpose of the meeting was to discuss the above referenced proceeding. The presentation focused on the positions SBC recently filed in its comments and reply comments.

We are submitting the original and one copy of this memorandum to the Secretary in accordance with Section 1.1206 of the Commission's rules. Please stamp and return the provided copy to confirm your receipt. Please contact me on (202) 326-8811, should you have any questions.

Sincerely,

David Hostetter

David J. Hostetter

CC: T. Preiss
R. McDonald
A. Candeub

CC DOCKET NOS. 96-98
And 99-68

RECIPROCAL COMPENSATION FOR ISP-BOUND TRAFFIC

EX PARTE PRESENTATION BY
SBC COMMUNICATIONS
AUGUST 15, 2000

AGENDA

I. Introduction and Purpose (Don Cain)

II. Legal and Policy Position (Gary Phillips)

III. Historical Background (David Hostetter)

IV. U.S. Position on the Appropriate International Regulatory Treatment of ISP Traffic (Don Cain)

V. Compromise Transition Positions (Gary Phillips)

I. Introduction and Purpose

II. Reciprocal Compensation Does Not and Should Not Apply to ISP-bound Traffic

The Issue: Is ISP Traffic Interstate or Local?

- Section 251(b)(5) requires reciprocal compensation for the transport and termination of telecommunications.
    - FCC has ruled that this provision applies only to local telecommunications traffic, which is defined as traffic that "originates and terminates...with a local service area."
    - This was a matter of statutory interpretation, not statutory limitation
- Thus from a legal standpoint, the issue is straightforward: "Is the provision of Internet traffic to an ISP the "termination" of "local telecommunications traffic?"
- This, in turn hinges on whether ISP-bound traffic terminates at the point of delivery - *i.e*, the ISP server

Historical Regulatory Principles Determine Jurisdiction and Regulation

- The answer is dictated by a principle that has been settled for almost 60 years - a principle that has been applied to all types of communications by wire and radio in both regulatory and jurisdictional contexts:

THE BOUNDARIES OF A COMMUNICATION ARE DETERMINED ON AN END-TO-END BASIS.

Even CLECs Agree that ISP Traffic is Interstate

- CLECs agree that, for jurisdictional purposes, ISP traffic must be analyzed on an end-to-end basis and that under that analysis, ISP traffic is Interstate.
    - They agree that end-to-end analysis applies even when a telecommunications service is used to access an information service.
    - AT&T agrees that the service addressed in the *Teleconnect* case is analogous.

The Jurisdictional Status of ISP-Bound Traffic is Controlling

- Reciprocal compensation is required only for local traffic - which is defined as traffic that originates and terminates within a local service area. The fact that ISP-bound traffic is interstate *necessarily means* that it does not originate and terminate within a local service area.

- The application of section 251(b)(5) to interstate interexchange traffic would be inconsistent with section 251(i), which states that §251 is not intended to limit or affect the FCC's authority under §251

The End-to-End Analysis Has Never Been Limited to Jurisdictional Determinations.

- In *Teleconnect*, the FCC considered and rejected the argument that the end-to-end analysis is limited to jurisdictional determinations.

- CLECs do not cite a single case in which the end-to-end analysis has been rejected in favor of some other analysis.

- In short, the fact that ISP-bound traffic is Interstate necessarily means that it is NOT subject to the reciprocal compensation provisions of the ACT.

ISP Traffic Does Not "Terminate" at the ISP Server Pursuant to § 51.701(d) of the Commission's Rules

- CLEC argument that § 51.701(d) defines "termination" with reference to "functions," not end points, is wrong
  - Under the express terms of the rule, the termination functionality must be provided in connection with "local telecommunications traffic" that is delivered to the "called party"
  - The rule reflects the analysis in the Local Competition Order, which specifically rejects the notion that termination should be defined solely with reference to function
  - ISP-bound traffic is not local telecommunications traffic
  - The ISP is NOT the called party

- Even AT&T agrees that § 51.701(d) "in no way purports to define what traffic is 'local' and what traffic is 'non-local'"

The Definitions of Telephone Exchange Service and Exchange Access are a Red Herring

- These terms are not mentioned in the statute, rules, or relevant paragraphs of the Local Competition Order
- The FCC holding in the *Advanced Services Remand Order* is, in any event, correct for the reasons stated in that order and because ISPs provide, *interalia*, access to IP telephony services
- Many CLECs agree that this issue is irrelevant

Other CLEC Arguments Also are Meritless

- Technical similarities between ISP-bound traffic and local traffic are irrelevant to the classification of the traffic
  - The classification of ISP-bound traffic depends on the termination point, not the facilities used to carry it (*NARUC v. FCC,* 746 F2D 1492 (D.C. Cir. 1984).
  - CLEC arguments prove too much in any event, because they apply, not only to ISP-bound traffic, but to other types of Interstate access serves
    - FG-A access is provided via a "local" telephone number and is carried over local interconnection trunks
    - Interstate calls subject to interim number portability arrangements using remote call forwarding are terminated over local interconnection trunks
    - Answer supervision is provided on FX traffic. It also is returned upon delivery to an IXC operator service platform of certain types of access code calls
      - It is not returned though when the IXC actually delivers the call to the called party
    - The authentication process parallels the validation process for operator-assisted long-distance calls

II.A. Relevance of Access Charge Exemption

The Status of ISP-Bound Traffic Under the Access Charge Regime is Irrelevant

- The FCC has never held that reciprocal compensation must be paid whenever traditional IXC access charges are not.
  - Under FCC rules, reciprocal compensation applies to local telecommunications traffic - I.E., "Telecommunications traffic...that originates and terminates within a local calling area."
    - It is the boundaries of the communication that controls; not whether traditional Part 69 access charges may apply.
  - The Local Competition Order likewise provides that reciprocal compensation must be paid for the termination of local traffic, but not Interstate Interexchange traffic.
    - This holding was based on a *Structural* analysis of TA96. Specifically, the FCC held that "As a legal matter," local and interstate access services are different services that are subject to different statutory regimes. (¶1033)

Arguments That Internet Traffic Should Be Treated Like Local Traffic for Compensation Purposes Are Fundamentally Wrong

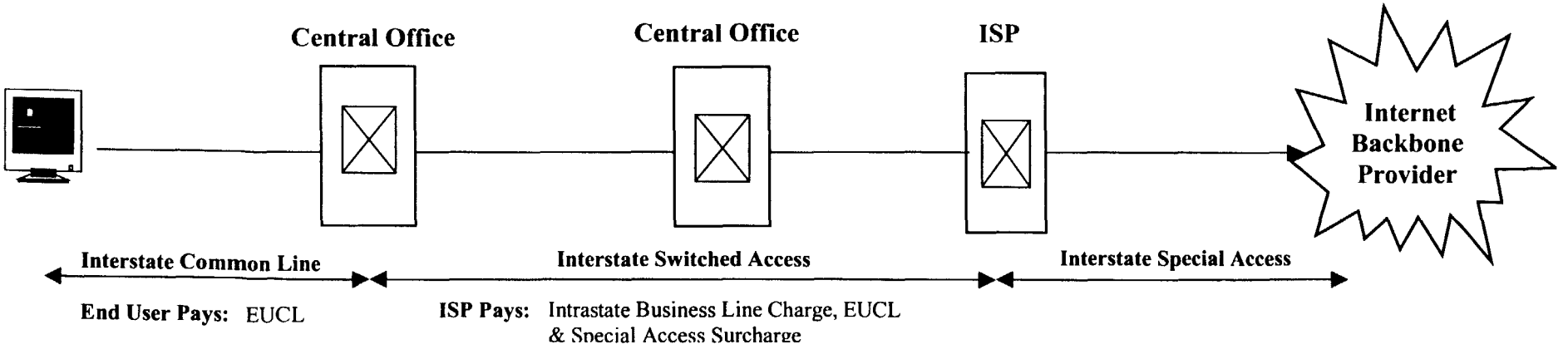
- In the Local Competition Order, the FCC decided that reciprocal compensation should be paid for local traffic because local traffic is sent-paid traffic – i.e., the calling party pays the originating carrier for completion of the call (originating and terminating functions), while the called party pays nothing to the terminating carrier to receive local calls.
- The Commission also decided that reciprocal compensation should not be paid for interexchange traffic. The Commission noted that interexchange traffic is subject to a different compensation regime than local traffic. Under this regime, the calling party typically pays an IXC for call completion, and the IXC pays access charges to the originating and terminating carriers.
- ISP-bound traffic does not fit the sent-paid calling model characteristic of local traffic and for which reciprocal compensation is designed. Rather, it fits the interexchange model.
- The ISP pays its serving carrier for its interstate access through the ESP exemption - reciprocal compensation should not apply because the calling party has not paid the originating carrier for completion of an Internet call - the calling party pays the ISP for its access to the Internet.

Although the Carrier Serving the ISP Cannot Collect Carrier Access Charges, it is Nonetheless Compensated by the ISP for its Services and Thus Has no Need for Reciprocal Compensation

- The ESP exemption is an interstate pricing structure that permits ISPs to pay for receipt of interstate Internet-bound calls through end user access charges (subscriber line charge and special access surcharge) and intrastate business service charges – these charges are a substitute for carrier access charges (CCL, PICC, local switching and switched transport charges) Figure 1
- ESP exemption pays for the same network components that are recovered through carrier access charges
  - The FCC has stated "all switching functions will continue to be subsumed under the local business rate" paid by ESPs
  - The connection between an ISP's premises and the telephone company's local switch is paid for through the SLC and the local business line charges instead of switched transport charges
  - *Unlike local traffic, Internet traffic triggers the special access surcharge which is intended to compensate for interstate use of transport, switching and common line components of the network even though interstate traffic that "leaks" looks like local*
  - Special access surcharge applies even when an ISP purchases private line services from another carrier
- When two carriers collaberate on the delivery of Internet traffic to an ISP, the carrier serving the ISP is compensated is compensated through the ESP exemption. Figure 2

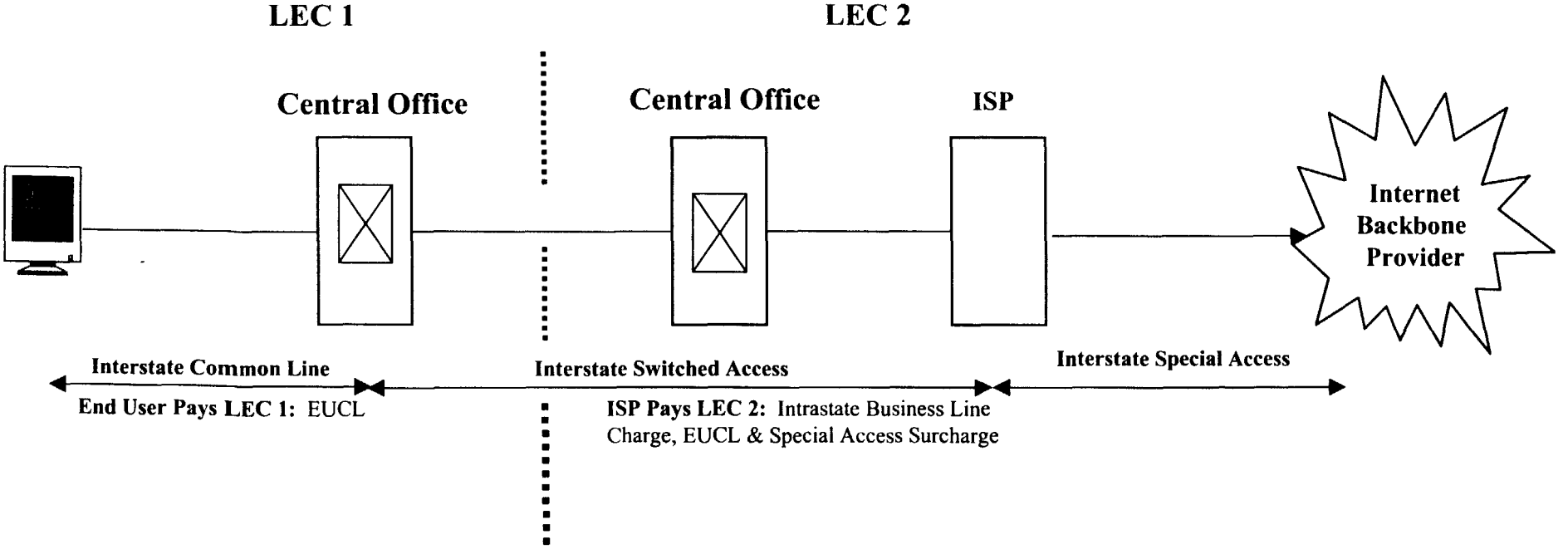
Enhanced Service Provider Exemption

Figure 1



Enhanced Service Provider Exemption

Figure 2



Other Economic Considerations

- Structure differences between Internet calls and local calls are not just a matter of theory, CLECs can seek recovery from ISP customers
  - ISPs subscribe to and pay for more telephone lines than most cities and states
  - ISPs are typically purchasing more sophisticated services like ISDN
  - SBC comparison of ISDN-PRI rates with costs of serving ISP (assuming tandem-switching reciprocal compensation rate reflects costs) reflects a 30% contribution

- Reciprocal compensation payments do not reflect ILEC avoided costs
  - ILEC avoids little or no costs when CLEC wins ISP customer, plus it loses ISP revenues

- Payments received by CLECs from the ISPs they serve must be seen as compensation for delivery of Internet-bound calls, the same service for which these CLECs also seek reciprocal compensation
  - In the May 1997 Access Reform Order the FCC stated that if ILECs cannot recover the costs associated with ISP-bound traffic, they should ask the states for permission to raise

II.B. U.S. Position on the Appropriate International Regulatory Treatment of ISP-traffic

Inconsistency Between U.S. International and Domestic Internet Policies

- FCC's 3 core principles concerning the Internet:

1. Internet issues best resolved in the marketplace rather than intrusive government regulations

2. Internet's growth best achieved by one national policy

3. The Commission has advocated global policies that rely on competition and the marketplace rather than government regulation

Inconsistency Between U.S. International and Domestic Internet Policies

- Reciprocal compensation is a glaring exception to FCC's Internet policies
- FCC's domestic position could undermine U.S. international position
- World-wide regulation of the Internet to be voted on at WTSA/ITU meeting in Montreal (Sept. 27 - Oct. 6, 2000)
- Asia, Africa, and Australian position applies traditional accounting rate settlements (reciprocal compensation) to international Internet traffic

Inconsistency Between U.S. International and Domestic Internet Policies

- U.S. State Department Position Paper (handout)

- U.S. Position:
  - Internet traffic is non-bilateral (not reciprocal) therefore terminating settlement arrangements are not appropriate.
  - Applying terminating settlement arrangements to Internet traffic would discourage infrastructure investment
  - Don't subject the Internet to regulation

Inconsistency Between U.S. International and Domestic Internet Policies

- We urge the FCC to adopt a domestic policy that is consistent with U.S. international policy
- FCC should rule that reciprocal compensation is inappropriate for Internet traffic
- Bill and Keep is the appropriate domestic policy for Internet traffic

III. Compromise Transition Positions

Transition Compromise Proposals

- Condition Bill and Keep for ISP traffic on the availability of Bill and Keep for local traffic
  - Gives CLECs the option of treating local traffic like ISP traffic
    - Obviates need to distinguish the two for billing purposes
  - Eliminates any alleged ability of ILECs to secure excessive reciprocal compensation rates
  - First step towards NOI

Transition Compromise Proposals

- Limit reciprocal compensation based on 2:1 traffic ratio
  - Obviates need to distinguish between local and ISP traffic
  - Eliminates any alleged incentive for ILECs to secure excessive reciprocal compensation rates
  - Gives CLECs some reciprocal compensation for ISP traffic - within reasonable limits
    - But prevents CLECs from excessively gaming reciprocal compensation. Reduces the extent to which reciprocal compensation regime drives market decisions.
  - Encourages CLECs to sign up customers who originate traffic, since they are permitted to bill 2 ISP minutes for every originating minute they generate

Discussion